

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

PERSONALIZED MEDIA COMMUNICATIONS, LLC,)	
)	
Plaintiff)	
)	
v.)	Case No. 2:15-cv-01366-JRG-RSP
)	
APPLE, INC.,)	
)	
Defendant)	
)	

**PERSONALIZED MEDIA COMMUNICATIONS, LLC’S UNOPPOSED MOTION TO
PERMIT VIDEO PRETRIAL CONFERENCE**

In light of the significant worsening of the COVID-19 pandemic over the past several weeks, Plaintiff Personalized Media Communications, LLC (“PMC”) respectfully moves the Court to permit the upcoming Pretrial Conference, currently scheduled for February 3, 2021 at 9 a.m. in Marshall, Texas before Magistrate Judge Payne to occur via videoconference or other remote means for all participants. Defendant Apple, Inc. (“Apple”) does not oppose this motion.

The Court has successfully held pretrial conferences as well as other types of hearings via videoconference this year because of concerns related to the COVID-19 pandemic. *See, e.g., Image Processing Technologies, LLC v. Samsung Electronics Co., Ltd.*, Case No. 2:20-cv-00050-JRG-RSP, ECF No. 163 (Minute Entry for Interim Pretrial Video Conference before Magistrate Judge Payne). While PMC is aware of the Court’s preference for in-person conferences, the recent worsening of the COVID-19 pandemic nation-wide, including the spread of a more contagious variant, presents exceptional circumstances.

As this Court has noted, there is “a dangerously rising rate of increase in COVID-19 cases and swelling hospitalizations in this district and across the county.” *Ultravision Technologies, LLC v. GoVision LLC*, No. 2:18-cv-00100 (E.D. Tex. Nov. 20, 2020), ECF No. 563 at 2. Harrison County Judge Chad Sims recently warned that the county is experiencing a “substantial increase in [its] case count.”¹ Indeed, Harrison County has been under heightened restrictions since late December because it resides within a Trauma Service Area which is classified as “an area with high hospitalizations.”^{2 3} While Executive Order GA-32 allows counties to lift these restrictions if it has “minimal COVID-19 cases” (fewer than 30 new confirmed cases in the last 14 days), Harrison County certainly does not qualify, as it has reported 256 confirmed cases over the period of January 1-11 alone.⁴

Cases across the country are similarly on the rise. Plaintiff’s counsel is located in Boston, Massachusetts and San Francisco, California. Both states continue to experience alarming increases in COVID-19 infections and hospitalizations. On Thursday, January 7, 2021,

¹ See Harrison County Judge, FACEBOOK (Jan. 4, 2021), <https://www.facebook.com/harrisoncountyjudge/>. County Judge Sims cited a January 4, 2021 report showing an average of 43 new cases of COVID-19 per day, a dramatic increase from the rate of about 16 new cases per day as of December 28, 2020. *Id.*

² See *Executive Order GA-32*, Texas Department of State Health Services, <https://www.dshs.texas.gov/ga32/> (last visited Jan. 11, 2021).

³ Trauma Service Areas (“TSA”) are classified as having “high hospitalizations” if, for the last seven days, 15% or more of total hospital capacity has been COVID-19 patients. As of January 9, 2021, the hospitalization rate—the percentage of total hospital capacity used by COVID-19 patients—for the area including Harrison County was 25.43%. See *Number of COVID-19 Hospitalizations*, Texas Department of State Health Services, Trauma Service Area Hospital Data: Hospitals Regional, TSA G, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/0d8bdf9be927459d9cb11b9eae6101f> (last visited Jan. 11, 2021).

⁴ See *New Confirmed Cases by County: Harrison County, Texas COVID-19*, Texas Department of State Health Services, <https://tabexternal.dshs.texas.gov/t/THD/views/COVIDExternalQC/COVIDTrends?:isGuestRedirectFromVizportal=y&:embed=y> (last visited Jan. 11, 2021).

Governor Baker of Massachusetts announced extended coronavirus restrictions as the state “is fighting its way through a second surge.”⁵ ⁶ Gov. Baker pointed to the rising hospitalizations in the state, which have risen 145% over the past six weeks; hospitals in the state are now 84% occupied.⁷ Massachusetts has also “strongly discouraged” employers “from requiring or allowing business-related travel to non-lower-risk states” such as Texas.⁸ Similarly, residents of the Bay Area Region, including San Francisco, are currently required to comply with the Regional Stay at Home Order issued on December 3, 2020 by the State of California’s Department of Public Health in response to “the recent, unprecedented rise in the rate of increase in COVID-19 cases, hospitalizations, and test positivity rates across California.”⁹ The Order is a response to the urgent concern that “the rate of rise in cases, if it continues, is at risk of overwhelming the ability of California hospitals to deliver healthcare to its residents suffering from COVID-19 and from other illnesses requiring hospital care.”¹⁰ Though Apple counsel does not join this motion, its counsel would need to travel from cities across the country, which are all subject to similar restrictions. The Centers for Disease Control and Prevention has warned that

⁵ See *Governor Baker Announces 2-Week Extension of Mass. COVID Restrictions*, NBC BOSTON, Jan. 7, 2021, <https://www.nbcboston.com/news/local/will-gov-baker-announce-extension-of-mass-covid-restrictions-thursday/2274452/>.

⁶ See Office of the Governor, COVID-19 Order No. 59, Dec. 22, 2020, <https://www.mass.gov/doc/covid-19-order-59/download>.

⁷ See NBC Boston, *supra* note 5.

⁸ See *COVID-19 Travel Order, Information for Employers*, <https://www.mass.gov/info-details/covid-19-travel-order#information-for-employers-> (last visited Jan. 8, 2021).

⁹ See California Dept. of Public Health, *Regional Stay at Home Order*, Dec. 3, 2020, <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf>.

¹⁰ *Id.* As of January 9, 2021, Intensive Care Unit capacity of Bay Area hospitals had dropped to 3%. See Alix Martichoux, *Latest Bay Area ICU Capacity Totals*, ABC 7 News, Jan. 9, 2021, <https://abc7news.com/health/latest-bay-area-icu-capacity-totals/8478535/>.

travel, such as “being on trains, buses, in airports” increases the “chance of spreading and getting COVID-19” and has recommended that “postponing travel and staying home is the best way to protect yourself and others from COVID-19.”¹¹

Given the current state of the pandemic, PMC requests that the Court conduct the February 3 Pretrial Conference by videoconference for all participants. The parties submit that holding the hearing by videoconference will allow the proceedings to go forward in a timely manner, while at the same time lessening the risk of contracting or spreading COVID-19 that would arise from air travel and attendance at an in-person gathering.

Accordingly, PMC respectfully requests that the Court hold the pretrial conference by videoconference.

Dated: January 11, 2021

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¹¹ See Centers for Disease Control and Prevention, *Domestic Travel During the COVID-19 Pandemic*, Dec. 2, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html>.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service on January 11, 2021. Local Rule CV-5(a)(3)(A).

/s/ S. Calvin Capshaw

CERTIFICATE OF CONFERENCE

The undersigned certifies that Douglas Kline, counsel for Plaintiff, met and conferred with Marc Sernel, counsel for Defendant, and this motion is unopposed.

/s/ Andrew Ong